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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR FLORES, Defendant and Appellant.	B206483 (Los Angeles County Super. Ct. No. BA324317)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marcelita V. Haynes, Judge. Affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Roberta L. Davis , Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Oscar Flores appeals from the judgment entered following a jury trial that resulted in his conviction for possession of methamphetamine for sale. Sentence was suspended and Flores was placed on probation for a period of three years. Flores contends: (1) the trial court erred by denying his pretrial suppression motion; and (2) the evidence was insufficient to support the verdict. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

At approximately 2:00 p.m. on June 14, 2007, Los Angeles Police Department (L.A.P.D.) Officers Matthew Meneses and Sergio Salas were on patrol in a marked patrol vehicle in the area of Medford Avenue and Indiana Street in Los Angeles, an area known for narcotics activity. They observed Flores driving a sports utility vehicle (SUV) 60 miles per hour in a 35 mile-per-hour zone, and effectuated a traffic stop. Flores pulled his vehicle partially into the driveway of his residence.

Meneses ran a computer check and determined that Flores's driver's license had been suspended or revoked. He also discovered that Flores had outstanding arrest warrants, and that Flores was not the registered owner of the vehicle. The officers arrested Flores and conducted a search incident to arrest. One hundred forty dollars in $10 and $20 bills were discovered in Flores's sock.

Flores was the only occupant of the SUV. Meneses decided to impound the vehicle and conduct an inventory search. As he entered the SUV to check the mileage, he immediately noticed that the "ceiling upholstery was pulled away a little from where the ceiling meets the window" and "hanging open" about an inch. He touched the tear in the upholstery and found two very small baggies containing 11.17 grams of methamphetamine. As he continued his search, he observed 43 small, empty baggies, approximately one and one-half inch square, inside a larger baggie in the vehicle's center console.

Officer Meneses testified that, in his opinion, the methamphetamine was in a usable amount and was possessed for sale, based on the quantity of the drug, the cash discovered in Flores's sock, the absence of any paraphernalia to use the drug, and the presence of the empty baggies.

b. *Defense evidence.*

The SUV's registered owner, Gisette Lobato, had known Flores for approximately 15 years. She did not believe he had been in possession of methamphetamine at any time in 2007. Between January and June 2007, Lobato lent her SUV to a variety of people, including her sister, her daughter's father, her father, and friends. On June 14, 2007, she asked Flores to take the SUV to the mechanic while she went to a doctor's appointment. Flores agreed and lent his vehicle to Lobato. When Lobato left the SUV at Flores's residence, the ceiling upholstery was not pulled away from the window. When she retrieved the vehicle from the impound lot after Flores's arrest, the upholstery on the driver's side ceiling had been ripped and pulled down. The tear in the upholstery was visible in photographs taken at the time of Flores's arrest. Additionally, the center console cover, which had been intact when she left the vehicle with Flores, was cracked and the hinge was damaged. The SUV did not contain methamphetamine when she left it with Flores.

Flores testified in his own behalf, as follows. He agreed to take the SUV to a mechanic and lent Lobato his car. Flores brought his cellular telephone and cash with him, but did not bring a wallet because he was wearing shorts. He had $140 in cash to purchase food for his four children. The mechanic turned out to be too busy to look at the vehicle that day.

As Flores drove home, he noticed a police car following him for approximately eight blocks. The patrol car did not turn on its sirens or lights, and Flores had not been speeding. As Flores pulled into the driveway of his residence, Meneses told him to stop. Appellant pulled part way into the driveway and exited the SUV. Meneses searched the SUV while Salas searched Flores. Salas gave a cellular telephone and other items to Flores's mother, who was in the yard of the residence where Flores parked. Flores was

unaware there were warrants outstanding for his arrest. When Meneses showed him the two baggies of drugs, Flores told the officer they were not his. He did not know there was methamphetamine in the SUV, did not know there were baggies in the center console, and did not notice a tear in the ceiling upholstery.

2. *Procedure.*

Trial was by jury. Flores was convicted of possession of methamphetamine for sale (Health & Saf. Code, § 11378). Imposition of sentence was suspended and Flores was placed on probation for a period of three years. The trial court imposed a restitution fine, a suspended parole restitution fine, a laboratory fee, and a court security assessment. Flores appeals.

DISCUSSION

1. *Flores's suppression motion was properly denied.*

a. *The suppression hearing and the trial court's ruling.*

(i) *The suppression hearing.*

Before trial, Flores moved to suppress the evidence seized in the search of the SUV on the grounds the search violated the Fourth Amendment. (Pen. Code, § 1538.5.)[1] The trial court conducted a suppression hearing at which the following evidence was adduced.

Officer Meneses testified that he observed Flores driving an SUV in the area of Medford and Indiana above the posted speed limit. Meneses activated the patrol vehicle's lights and siren and Flores pulled the SUV partially into the driveway of his own residence. Initially Meneses testified that the SUV's path into the driveway was blocked by a fence. Upon being shown a photograph taken at the scene, Meneses conceded that at least half of the gate was open. According to Meneses, one-third of the vehicle was in the driveway, one-third was on the sidewalk, and one-third was "hanging over the street." Flores's mother was in the front yard.

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1 All further undesignated statutory references are to the Penal Code.

Meneses ran a computer check and determined that Flores did not have a valid driver's license, and there were several misdemeanor warrants out for his arrest. Meneses placed Flores under arrest as a result.

The computer check indicated the registered owner of the vehicle was Gisette Lobato, who did not live at Flores's address. Meneses had had prior contacts with Flores. He also knew Lobato, and had impounded her vehicle previously. He was aware Flores and Lobato knew each other. The computer check did not indicate the SUV was stolen, but there was a high rate of unreported stolen vehicles in the area. Meneses decided to impound the SUV because Flores was "not the registered owner" and did not have a driver's license. It was L.A.P.D. policy to impound a vehicle whenever an unlicensed driver was discovered driving it, in order to minimize the police department's liability. Moreover, in this case the SUV was not legally parked.

Lobato's mother or sister came to Flores's residence after Meneses had conducted the inventory search and "after the whole process was completed." Meneses did not ask either of them if they had driver's licenses.

(ii) *The trial court's ruling.*

Upon examination of photographic evidence, the trial court found that the driveway gate was open, not closed. The SUV was parked across the sidewalk. Less than one-third of the vehicle protruded into the street "a little." There was space for the SUV to have been pulled forward, entirely into the driveway. The trial court nonetheless denied the motion. It concluded that because the SUV was illegally parked, Flores was not licensed, and the registered owner was not on the scene prior to the inventory search, there was no Fourth Amendment violation. The court further reasoned that the police have no duty to attempt to find someone to legally take custody of the vehicle.

b. *Discussion.*

(i) *Flores had a legitimate expectation of privacy sufficient to allow his challenge to the propriety of the search.*

Preliminarily, the People contend Flores lacks "standing" to challenge the search and seizure because he was not the registered owner of the SUV.[2] This contention lacks merit. First, the People cannot challenge Flores's legitimate expectation of privacy in the SUV because they did not raise the issue below. "While the burden is generally on the defendant to establish a constitutionally reasonable expectation of privacy regarding the location searched [citation], the prosecution may lose the opportunity to challenge a defendant's standing on appeal 'when it has acquiesced in contrary findings by [the trial court] or when it has failed to raise such questions in a timely fashion during the litigation' [citations]." (*People v. Middleton* (2005) 131 Cal.App.4th 732, 737, fn. 2.) Here, the parties and the court assumed that Flores had a legitimate expectation of privacy and could challenge the search and seizure. Indeed, at the suppression hearing, Lobato—the owner of the vehicle—was present and available to testify. The parties discussed whether her testimony was necessary. The prosecutor offered to stipulate that Lobato was the registered owner, and the trial court stated that the defense did not need a further stipulation that Lobato had given Flores permission to drive the car. The court explained, "I don't think you need it. *There's not a question that he was not driving with[out] consent, he wasn't arrested for that purpose*." (Italics added.) The People did not object. Under these circumstances, the People's belated contention is not cognizable on appeal.

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[2] *People v. Ayala* (2000) 23 Cal.4th 225, 254, footnote 3, explained that to avoid confusion, use of the term " 'standing' " should be avoided when analyzing a Fourth Amendment claim. We use the term here where necessary to describe the trial court's ruling and the parties' arguments.

In any event, the People's contention fails on the merits. To "obtain suppression of evidence discovered in an unlawful search, a defendant has the burden of proving that he had a legitimate expectation of privacy. [Citation.]" (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1239; *Rawlings v. Kentucky* (1980) 448 U.S. 98, 104; *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132.) Accordingly, a person may challenge the legality of a search or seizure only when he shows a personal interest in the privacy of the place searched or the item seized. (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134; *People v. Carter* (2005) 36 Cal.4th 1114, 1141; *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1203.) "Whether the defendant had a legitimate expectation of privacy is subject to a two-part test: (1) did the defendant manifest a subjective expectation of privacy in the object of the search? and (2) is society willing to recognize the expectation of privacy as legitimate?" (*People v. Tolliver, supra,* at p. 1239; *California v. Ciraolo* (1986) 476 U.S. 207, 211, 219-220.) "The legitimacy of the expectation of privacy is determined under the totality of the circumstances." (*People v. Tolliver, supra,* at p. 1239; *In re Rudy F., supra,* at p. 1132.) It is not dependent on a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. (*In re Rudy F., supra,* at pp. 1131-1132.) "Among the factors sometimes considered . . . are whether the defendant has a possessory interest in the thing seized or place searched [citation], 'whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' [Citation.]" (*Id.* at p. 1132; *People v. Stewart* (2003) 113 Cal.App.4th 242, 250.)

Here, all the evidence points to the conclusion that Flores had a legitimate expectation of privacy in the SUV. It was undisputed at the suppression hearing that the owner had given him permission to drive the vehicle. (See *People v. Stewart, supra,* 113 Cal.App.4th at pp. 250-251.) Like any other driver lawfully in possession of a vehicle, Flores had the right to exclude others from the SUV. Nothing suggested he had taken anything less than the normal precautions any driver employs to maintain his or her

privacy in a vehicle. (See *People v. Stewart, supra,* at p. 254.) Society generally recognizes that a person driving another's vehicle with the owner's full permission and knowledge has a legitimate expectation of privacy. (See, e.g., *U.S. v. Cooper* (11th Cir. 1998) 133 F.3d 1394, 1398; *United States v. Portillo* (9th Cir. 1980) 633 F.2d 1313, 1317 [defendant, who had both permission to use friend's automobile and the keys to the ignition and trunk, and could exclude all others except the owner, had a legitimate expectation of privacy necessary to challenge the propriety of a search of the vehicle].)

The People's attempt to analogize cases involving drivers of stolen cars is not persuasive. The People are of course correct that the driver of a *stolen* vehicle lacks a legitimate expectation of privacy to contest the search of that vehicle. (See *People v. Carter, supra,* 36 Cal.4th at p. 1141; *People v. Shepherd* (1994) 23 Cal.App.4th 825, 829; *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533.) Here, however, Flores had not stolen the car.

The People further argue that an individual not legally present in a vehicle cannot invoke the privacy of the premises searched. Because Flores was driving without a license, the People assert, he was not legally present in the vehicle. We find *People v. Stewart, supra,* 113 Cal.App.4th 242, instructive in addressing this contention. In *Stewart*, the court concluded the appellant was legitimately on the premises of a residence even though he had been using the premises to traffic in illegal narcotics, an activity the homeowner had not approved. (*Id.* at pp. 253, 256.) Despite his illegal activity, "he nevertheless possessed the householder's permission to be at the house" (*id.* at p. 253), and was legitimately on the premises. The same is true here: although Flores was driving without a license, he nevertheless had the owner's permission to drive the car. The People cite no case holding that a defendant driving a borrowed car with the owner's permission lacks an expectation of privacy because he or she does not have a driver's license, and we are aware of none.

(ii) *The SUV was properly impounded under the community caretaking exception to the warrant requirement.*

Having concluded Flores has "standing," we turn next to the trial court's denial of his suppression motion. Flores complains that the trial court erred by denying his suppression motion because: (1) police impoundment of the SUV did not serve the " 'community caretaking functions' " described in *South Dakota v. Opperman* (1976) 428 U.S. 364, 368; and (2) the search of the SUV was not circumscribed by standardized criteria aimed at ensuring the inventory procedures were administered in good faith. Flores's first contention lacks merit, and his second is not cognizable on appeal.

A. *Standard of review.*

When reviewing the denial of a suppression motion, we view the record in the light most favorable to the trial court's ruling, and defer to the trial court's express or implied factual findings if supported by substantial evidence. We exercise our independent judgment to determine whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Davis* (2005) 36 Cal.4th 510, 528-529; *People v. Maury* (2003) 30 Cal.4th 342, 384; *People v. Strider* (2009) 177 Cal.App.4th 1393,1398; *People v. Krohn* (2007) 149 Cal.App.4th 1294, 1298.) Challenges to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment (*People v. Carter, supra,* 36 Cal.4th at p. 1141), and evidence obtained as a result of an unreasonable search and seizure is excluded at trial only if required by the federal Constitution (*People v. Camacho* (2000) 23 Cal.4th 824, 830; *People v. Strider, supra,* at p. 1398; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1498).

B. *The community caretaking exception to the warrant requirement.*

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel. (U.S. Const., 4th Amend.; *People v. Thompson* (2006) 38 Cal.4th 811, 817; *People v. Camacho, supra,* 23 Cal.4th at pp. 829-830; *People v. Williams* (2006) 145 Cal.App.4th 756, 761.) A warrantless search or seizure is presumed to be illegal (*People v. Williams, supra,* at p. 761; *Miranda v. City of*

Cornelius (9th Cir. 2005) 429 F.3d 858, 862), and the prosecution has the burden of showing the officers' actions were justified by an exception to the warrant requirement. (*People v. Strider, supra,* 177 Cal.App.4th at p. 1400.)

In *South Dakota v. Opperman, supra,* 428 U.S. 364, the United States Supreme Court held that police may constitutionally impound vehicles that jeopardize public safety or the efficient movement of traffic, as part of their " 'community caretaking functions.' " (*Id.* at pp. 368-369.) Whether impoundment is warranted under the community caretaking doctrine " 'depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.' " (*People v. Williams, supra,* 145 Cal.App.4th at p. 761.) When officers are warranted in impounding a vehicle, an inventory search conducted pursuant to standardized police procedures is constitutionally reasonable. (*Ibid*.) An officer need not use the least intrusive course of action when deciding whether to impound and search a car (*Colorado v. Bertine* (1987) 479 U.S. 367, 374-375), but his or her actions must be reasonable in light of the justification for the impound and inventory exception to the warrant requirement. (*People v. Williams, supra,* at p. 761.) An inventory search is constitutionally unreasonable when used as a ruse to conduct an investigatory search. (*Colorado v. Bertine, supra,* at pp. 371-372; *People v. Steeley* (1989) 210 Cal.App.3d 887, 891-892.)

In *Opperman,* the defendant's vehicle was impounded because it was illegally parked. An officer conducting the ensuing inventory search discovered marijuana in the car, and the defendant was charged with possession. (*South Dakota v. Opperman, supra,* 428 U.S. at p. 366.) After reiterating the traditional precept that a person's expectation of privacy in an automobile is less than that relating to a home or office (*id.* at pp. 367-368), *Opperman* observed that the authority of police to impound vehicles that are damaged or disabled, or "which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic," was beyond challenge. (*Id.* at p. 369.) It followed that an inventory of an impounded vehicle's contents is likewise constitutionally reasonable. (*Id.* at p. 372.) " 'It would be unreasonable to hold

that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it.' [Citation.]" (*Id.* at p. 373.) The inventory's purpose is not only for protection of the vehicle's owner, but also for the protection of the municipality and the officers against claims of lost or stolen property, as well as for protection of the public at large, who would be endangered should vandals find a firearm inside the vehicle. (*Id.* at p. 376, fn. 10.)

Flores relies upon *People v. Williams, supra,* 145 Cal.App.4th 756, in support of his contention that the impoundment of the SUV was not justified under *Opperman.* In *Williams,* our colleagues in Division Eight concluded that an impound of a vehicle parked in front of the defendant's house was unreasonable because it did not serve a community caretaking function. In *Williams,* a police officer observed the defendant driving without a seat belt and made a traffic stop. The defendant legally parked his car, which had been rented from an automobile rental agency, at the curb in front of his residence. The officer knew the residence was the defendant's. (*Id.* at pp. 759-760.) The car was validly registered to the rental company and had not been reported as stolen. The defendant provided the officer with his valid driver's license but did not have the vehicle registration or proof of insurance. A computer check revealed an outstanding arrest warrant for the defendant, and the officer placed him under arrest. The officer decided to impound the vehicle "because 'the driver in control of that vehicle was being arrested.' " (*Id.* at pp. 759-760.) The car could have been locked and lawfully left where the defendant had parked it, but the officer did not give the defendant the opportunity to do so. (*Ibid.*)

Williams concluded that the impoundment was constitutionally unreasonable. The defendant was a validly licensed driver, legally parked in front of his own home. The car was properly registered to a car rental company and had not been reported stolen; the officer had no reason to believe appellant was not in lawful possession of it. (*People v. Williams, supra,* 145 Cal.App.4th at p. 762.) There was no particular risk the car would be stolen or vandalized; it was in a residential area and other cars were parked on the street. Nor did it pose a hazard: it was not blocking a driveway or crosswalk and did not

create an impediment to other traffic. (*Id.* at pp. 762-763.) Because the defendant had a valid license, it was not necessary to impound the car to prevent continued unlawful operation. Under these circumstances, impoundment did not serve a legitimate community caretaking function and violated the Fourth Amendment. (*Ibid.*)

The People analogize to *People v. Steeley*, *supra*, 210 Cal.App.3d 887. There, a police officer stopped the defendant's vehicle because it had a burned-out headlight. Neither the defendant driver nor his passenger had valid driver's licenses, and the driver was not the registered owner of the car. The officer impounded the car, conducted an inventory search, and found methamphetamine in the glove compartment and a loaded revolver inside on the back seat. The defendant challenged the search on the grounds it had not been conducted pursuant to a written, routine policy "governed by standardized criteria." (*Id*. at p. 891.) In the course of rejecting that contention, *Steeley* concluded that, because there was no other licensed driver available to drive the vehicle, the defendant was not the registered owner, and the vehicle was blocking a driveway, "[i]t was not unreasonable for [the officer] to conclude that the appropriate way to protect the vehicle was impoundment." (*Id.* at p. 892.)

The instant case is closer to *Steeley* than *Williams.* Unlike in *Williams*, Flores did not have a valid driver's license. The car was not one that Flores had rented, but instead was registered to another owner, who did not live at Flores's residence. As we discuss, these differences are dispositive.

Vehicle Code section 22651, subdivision (h)(1) authorizes impoundment of a vehicle when a person is arrested for an offense and taken into custody. (See also *People v. Hoyos* (2007) 41 Cal.4th 872, 892.) Moreover, here the SUV was parked entirely across the sidewalk, in violation of Vehicle Code section 22500, subdivision (f) (prohibiting parking on "any portion of a sidewalk, or with the body of the vehicle extending over any portion of a sidewalk").[3] While these statutes do not suffice to

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[3] Flores argues that this statute is irrelevant, because it does not authorize impoundment. As the People point out, however, the car was not impounded simply

establish constitutional reasonableness (*South Dakota v. Opperman, supra,* 428 U.S. at p. 373; *People v. Williams, supra,* 145 Cal.App.4th at p. 762), they factor into our analysis. (See *Miranda v. City of Cornelius, supra,* 429 F.3d at p. 864 [a driver's arrest or citation is relevant insofar as it affects the driver's ability to remove the vehicle from a location at which it jeopardizes public safety or is at risk of loss].) In this case, the SUV's placement across the sidewalk created a potential safety hazard for pedestrians, who would likely walk into the street to get around the vehicle. Further, the SUV's location across the sidewalk in an area known for narcotics transactions could have created an increased potential for vandalism by persons irritated about the SUV's blockage of their path. Thus, contrary to Flores's argument, the location of the SUV was not unrelated to the officer's community caretaking function.

Because Flores was an unlicensed driver, it was not permissible for him to move the vehicle to a legal parking spot on the street, or fully into his driveway. (Veh. Code, § 14601, subd. (a).) Neither the owner nor a licensed passenger were present at the time the officer conducted the search. Lobato or her family members did not arrive on the scene until after the inventory search was complete. Although Flores argues there were other persons at the scene who could have moved the SUV, the record does not bear this out. At the time the inventory search was conducted, only Flores's mother was nearby. She was not the SUV's owner, and the officers had no reason to believe she had permission to drive the vehicle. Recruitment by the officers of a non-owner to move the vehicle could potentially have resulted in liability for the police department had the car been damaged while being moved.

Most significantly, Flores was not the registered owner of the car, nor was it registered to anyone at his residence. Given this fact, it was not unreasonable for the officer to conclude the safest course of action was impoundment. Moving the vehicle entirely onto Flores's private property, as Flores suggests, would have been

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because it was blocking the sidewalk. Instead, it was impounded because of the totality of the circumstances.

inappropriate, given that neither he nor anyone at his residence owned the car. Parking the car on the street, in an area known for narcotics activity, without the owner's consent or knowledge, cannot be considered a particularly reasonable option. Flores's argument that the officer knew he and Lobato were acquainted is unavailing; friendly acquaintances do not always remain so, and the officer could not have been sure that Lobato had given Flores permission to drive the car,[4] nor could he have been sure Lobato would have wished her vehicle moved onto Flores's property or left on the street. In any event, " '[T]he real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps . . . .['] [¶] 'The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' [Citation.]" (*Colorado v. Bertine*, *supra*, 479 U.S. at p. 374.)

In sum, Flores was properly arrested due to his outstanding warrants, requiring that the officer determine what to do with the SUV Flores had been driving. Flores was not the vehicle's owner, and neither the owner nor another licensed driver with the owner's permission to drive the car was available at the time of the inventory search. The car was parked illegally in an area known for narcotics transactions. Under these circumstances, we conclude the impound of the SUV was a reasonable exercise of the community caretaking function, undertaken to safeguard the SUV, and did not violate the Fourth Amendment.[5]

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[4] Flores argues that because the People have the burden of proof to justify a warrantless search, they were required to prove he was not in lawful possession of the SUV. In our view, the People amply met this burden through the officer's testimony that Flores was not the registered owner of the SUV, nor was it registered to anyone at his address.

[5] Flores points to Meneses's testimony that the L.A.P.D. impounds all vehicles if the driver does not have a valid license to prevent unlicensed drivers from continuing to drive. He contends that such a policy is overbroad and inappropriately focuses on a "deterrence rationale" which is incompatible with the community caretaking function. (See *Miranda v. City of Cornelius*, *supra*, 429 F.3d at p. 866.) However, our task is to

(iii) *Flores's challenge to the inventory search of the SUV is not cognizable on appeal because it was not raised below.*

As noted *ante,* "[i]f officers are warranted in impounding a vehicle, a warrantless inventory search of the vehicle pursuant to a standardized procedure is constitutionally reasonable." (*People v. Williams, supra,* 145 Cal.App.4th at p. 761; *South Dakota v. Opperman, supra,* 428 U.S. at p. 372.) Police officers may exercise discretion in conducting an inventory search, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." (*Colorado v. Bertine, supra,* 479 U.S. at p. 375; *Florida v. Wells* (1990) 495 U.S. 1, 3-4.) The standardized procedure need not be written. (*People v Needham* (2000) 79 Cal.App.4th 260, 266; *People v. Steeley, supra,* 210 Cal.App.3d at p. 889.) However, "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (*Florida v. Wells, supra,* at p. 4; *People v. Needham, supra,* at p. 266.) Where there is no standardized criteria or established routine whatsoever, an inventory search is "not sufficiently regulated to satisfy the Fourth Amendment." (*Florida v. Wells, supra,* at pp. 4-5; *People v. Williams* (1999) 20 Cal.4th 119, 126.)

Flores argues that the inventory search in the instant matter was unreasonable because the People did not show it was carried out pursuant to a standardized procedure or routine. He urges that the purpose of the inventory search was not to safeguard the contents of the vehicle, but to find evidence of crime. In support of this contention, Flores cites a portion of Meneses's preliminary hearing testimony. When asked at the preliminary hearing whether he examined a vehicle's ceiling upholstery as a matter of course, Meneses replied, "When we do an inventory search of a vehicle, based on our training and experience, I always check that location, because I have found narcotics there before."

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determine whether the particular impoundment of the SUV Flores was driving served a community caretaking function, not whether a departmental policy did so in the abstract.

A. *Forfeiture*

As the People correctly point out, Flores's contention is not cognizable on appeal because Flores did not sufficiently raise it below. When bringing a motion to suppress, a defendant must "state the grounds for the motion with sufficient particularity to give notice to the prosecution of the sort of evidence it will need to present in response." (*People v. Williams*, *supra*, 20 Cal.4th at p. 123; § 1538.5, subd. (a)(2) [motion to suppress "shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted"].)

People v. Williams, supra, 20 Cal.4th 119, clarified the level of specificity required in a motion to suppress. *Williams* explained: "Consistent with section 1538.5, subdivision (a)(2), . . . when defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification. [Citation.] Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal. '[T]he scope of issues upon review must be limited to those raised during argument . . . .' " (*People v. Williams, supra,* 20 Cal.4th at p. 136.) The prosecution retains the burden of proving that the warrantless search or seizure was reasonable. However, "if defendants detect a critical gap in the prosecution's proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal." (*Id.* at p. 130.) "[U]nder section 1538.5, as in the case of any other motion, defendants must specify the precise grounds for suppression of the evidence in question, and, where a warrantless search or seizure is the basis for the motion, this burden includes specifying the inadequacy of any justifications for the search or seizure. In the interest of efficiency, however, defendants need not guess what justifications the prosecution will argue. Instead, they can wait for the prosecution to present a justification. Moreover, in specifying the inadequacy of the prosecution's justifications, defendants do not have to

help the prosecution step-by-step to make its case. The degree of specificity that is appropriate will depend on the legal issue the defendant is raising and the surrounding circumstances. Defendants need only be specific enough to give the prosecution and the court reasonable notice. Defendants cannot, however, lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked." (*People v. Williams*, *supra*, at pp. 130-131.)

In *Williams*, the defendant contended on appeal that the police were not following a preexisting policy when they opened particular containers in his vehicle during an inventory search. (*People v. Williams*, *supra*, 20 Cal.4th at pp. 124-125.) *Williams* found the defendant had sufficiently raised the issue at the suppression hearing to preserve it for appeal. (*Id.* at p. 123.) In his papers and at the hearing, the defendant attempted to show the traffic stop was a ruse or pretext for a search of his truck. (*Id.* at p. 124.) The main thrust of his brief was that the police lacked probable cause to stop him, but he also asserted that the police had no policy governing inventory searches. (*Id.* at p. 127.) Indeed, his motion made clear that the government would have to prove a specific policy governing the officer's decision to open leather bags that were found in the defendant's vehicle. (*Id.* at p. 137.) His brief quoted the portion of *Wells v. Florida*, *supra*, 495 U.S. at page 4, requiring a specific policy or practice governing the opening of closed containers in a car. (*People v. Williams*, *supra*, at p. 127.) *Williams* concluded his moving papers were sufficient to provide notice of this argument to the prosecution. (*Id.* at p. 123.)

Here, in contrast, Flores's moving papers did not make clear he was asserting that the police lacked a policy governing inventory searches. Flores asserted that the search was conducted without a warrant, and that the "car stop, detention and arrest were without legal justification and therefore in violation of the Fourth Amendment." Under the heading, "Impound/Inventory Search in This Case Was Unlawful," Flores's moving papers stated: "Even having standardized criteria for an inventory search is not enough to justify an inventory search of a car. The police can only impound a car, and thus conduct an inventory search, of a car if removal of the car from the street furthers a community

caretaking function." Flores did not allege that such a standardized criteria was lacking in the instant case. The remainder of the motion was devoted to boilerplate recitations of various search and seizure principles, including the plain view doctrine, the fruit of the poisonous tree doctrine, the requirement of reasonable suspicion, and the like. The motion stated it was based on the points and authorities, "contents of the court file, and all the evidence and other material to be presented at the hearing," but this nonspecific recitation did nothing to put the People on notice of what was being challenged. Similarly, Flores's assertion, in the notice of motion, that he sought to suppress "[t]he methamphetamine found in the head-liner of the vehicle Mr. Flores was driving" did not adequately specify a challenge to the inventory search procedure. Contrary to Flores's argument, the mere statement that the drugs were found in the "head-liner" did not explicitly or implicitly suggest the argument he now asserts. In short, Flores's moving papers did not expressly or implicitly suggest he intended to assert the lack of a standardized inventory search criteria.

At the suppression hearing, defense counsel never argued the L.A.P.D. lacked a standard procedure or established routine for inventory searches. Counsel instead focused exclusively on the contention that the impound was not justified. She stated, for example, "So the only issue is, can you justify an impound search as a community care taking function when all that would have had to have been [done] to avoid impound was to move the car 10 feet?" Moreover, none of defense counsel's questions to Officer Meneses pertained to the issue of a standardized inventory search criteria. At the close of the evidentiary portion of the hearing, counsel's argument was directed entirely toward the question of whether the impound was justified, not whether the search itself was conducted properly.

Under these circumstances, Flores did not state with sufficient particularity that he intended to challenge the search of the SUV on the ground the police lacked a standardized procedure or practice. Accordingly, he did not give the People sufficient notice, and cannot raise the issue at this juncture. (*People v. Williams*, *supra*, 20 Cal.4th at p. 136; see also *People v. Oldham* (2000) 81 Cal.App.4th 1, 10-15.) Had the People

known Flores intended to assert the issue, they might well have been able to present ample evidence of the existence of a standardized inventory procedure followed by the L.A.P.D. and implemented by Meneses. " '[T]he scope of issues upon review must be limited to those raised during argument . . . . This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.' " (*People v. Williams*, *supra*, at p. 136.) As noted above, a defendant cannot "lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked." (*Id.* at p. 131.)

B. *Ineffective assistance of counsel.*

Flores urges that his counsel provided ineffective assistance by failing to challenge the inventory search at the suppression hearing. "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254; *People v. Lopez*, *supra*, at p. 966.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter*, *supra*, at p. 1211.)

Flores has not met this burden. He has not shown that defense counsel was asked for an explanation but failed to provide one. The record before us does not suggest counsel's performance was obviously inadequate, or that there could be no satisfactory explanation for her failure to argue the theory proposed on appeal. For example, counsel could have been in possession of information that the L.A.P.D. had a standardized inventory search policy, that the policy was reasonable, and that Meneses acted in accordance with that policy.[6] Nor has Flores shown it reasonably probable he would have obtained a more favorable result on his suppression motion had counsel made the argument he now proposes. (*People v. Wharton* (1991) 53 Cal.3d 522, 576.) He has presented no evidence demonstrating that the L.A.P.D. actually lacks a standardized procedure or routine for conducting inventory searches, or that Meneses was not acting in accordance with such a procedure. The testimony cited by appellant—Meneses's preliminary hearing testimony that he always checked the ceiling upholstery when conducting an inventory search because he had sometimes found narcotics in that area—does not necessarily mean the inventory search was pretextual and carried out in derogation of a standardized procedure. In *Opperman,* for example, the court concluded that an inventory search was not overbroad although an officer had opened an unlocked glove compartment. The court explained, "once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed

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6 During trial, for example, Meneses was asked what an inventory search involved. He replied: "We just have to check the whole entire vehicle. Make sure there's no contraband, guns, drugs—anything in the car. Because once it gets to the tow yard, they'll recheck the car. And if we leave anything behind of contraband, we can get in big-time trouble for that." On cross-examination, Meneses also testified that when conducting an inventory search he would check the odometer reading first. He explained that: "For six years I've followed my routine every time. Same things" and that "[w]e have routines we stick to" and "a lot of little boxes we have to fill out." The officer's testimony suggests the L.A.P.D. did, in fact, have a procedure regarding inventory searches.

access once inside the car," because the "protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, [citation], *or as here, contraband drugs, are . . . crucial*." (*South Dakota v. Opperman, supra,* 428 U.S. at p. 376, fn. 10, italics added.)

2. *The evidence was sufficient to prove Flores possessed the methamphetamine for sale.*

At the close of the People's case, Flores moved to dismiss pursuant to section 1118.1 on the ground the People's evidence was insufficient to prove the crime. The trial court denied the motion. When making its ruling, the court reiterated several times its view that the question was "really, really close," but concluded there was sufficient circumstantial evidence to support a conviction. Flores contends that motion should have been granted, because there was insufficient evidence he exercised dominion or control over the methamphetamine, or knew of its existence in the car. We disagree.

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ' "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.] 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) We review the trial court's ruling under section 1118.1 independently. (*People v. Cole, supra*, at p. 1213.)

"The essential elements of possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.' [Citations]." (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) To prove possession for sale, the People must also show the defendant possessed the controlled substance with the

intent to sell it. (See *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746; CALCRIM No. 2302.) Flores restricts his challenge to the dominion, control, and knowledge elements.

One may become criminally liable for possession of a controlled substance based upon either actual or constructive possession of the substance. (*People v. Morante* (1999) 20 Cal.4th 403, 417.) Actual possession requires that a person knowingly exercise direct physical control over a thing. (*People v. George* (1994) 30 Cal.App.4th 262, 277.) "Constructive possession 'occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.' " (*People v. Johnson* (1984) 158 Cal.App.3d 850, 854; *People v. Morante, supra*, 20 Cal.4th at p. 417.)

The fact that persons other than the defendant have access to the place in which the narcotic was found does not negate a finding of joint possession and control. (*People v. Kortopates* (1968) 264 Cal.App.2d 176, 179.) "Exclusive possession of the premises is not required, nor is physical possession of the drug. [Citation.]" (*Id*. at p. 180; *People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) However, "[m]ere proof of opportunity of access to a place where narcotics are found will not support a finding of unlaw[f]ul possession.' " (*People v. Tripp, supra*, 151 Cal.App.4th at p. 956; see also *People v. Kortopates, supra*, at p. 179; *People. v Redrick* (1961) 55 Cal.2d 282, 285; *People v. Glass* (1975) 44 Cal.App.3d 772, 777.) "As might be expected, no sharp line can be drawn to distinguish the congeries of facts which will and [those] which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic in a place to which he had access, but not exclusive access, and over which he had some control, but not exclusive control." (*People v. Redrick, supra*, at p. 287.) Among the relevant factors are whether the drugs were found among the defendant's personal effects and whether the defendant displayed consciousness of guilt. (*Id*. at pp. 287-288.)

Flores relies upon *People v. Johnson, supra*, 158 Cal.App.3d 850. There, officers conducted a search of a four-room house where six or seven persons were " 'milling

around' " the main room. The defendant and a woman were standing in the kitchen. In the kitchen, officers observed a small hole in a ceiling overhang, approximately six feet above the floor. Using a cinderblock as a stepstool, one of the officers shined his flashlight into the hole and retrieved two bottles containing PCP; they had not been visible from his vantage point on the floor. Defendant's fingerprint was found on one of the bottles. (*Id.* at p. 853.) The defendant did not have a key to the residence, none of his personal effects were found in the house, and the police could not determine who owned the house. The defendant had been observed in the front yard three days previously. (*Id.* at p. 853.) *Johnson* concluded the evidence was insufficient to establish the defendant possessed PCP for sale. (*Ibid.*) The defendant did not physically possess the PCP, nor was there credible evidence of his constructive possession. He was one of nine persons found in the house; there was no evidence he "owned, rented or in any way occupied the premises;" and the PCP bottles were not visible from the defendant's vantage point in the kitchen. (*Id*. at p. 854.) The fingerprint did not provide substantial evidence because the container itself was not contraband, and it could have been placed upon the bottle at a time when it did not contain PCP. (*Id.* at p. 855; see also *People v. Glass, supra,* 44 Cal.App.3d at pp. 776-777 [evidence insufficient to prove defendant, who was asleep in the bedroom of a house, had dominion and control over, or knowledge of, drugs found under living room couch, where there was no evidence he resided at or jointly possessed the premises; at most, he had an opportunity of access to the place where the narcotics were found]; *People v. Savage* (1954) 128 Cal.App.2d 123, 124-125 [after a noisy party in defendant's apartment, attended by six visitors, the butt of an old marijuana cigarette was found on the floor and seven marijuana cigarettes were found hidden in the couch; this evidence was insufficient to show the contraband was defendant's].)

On the other hand, the People point to, inter alia, *People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862. In *Newman,* the evidence was sufficient to support a conviction for possession for sale where the defendant was driving a borrowed vehicle and police effectuating a traffic stop discovered an envelope containing methedrine in plain view on the vehicle's tape

deck. (*People v. Newman, supra,* at p. 51.) The defendant denied knowing the envelope was present, or what was inside. The court nonetheless held, "sufficient circumstantial evidence existed from which the jury could infer that defendant possessed the drugs and had knowledge of their presence, for the envelope containing the drugs was located and visible on the tape deck below the dashboard of the car defendant was driving and was therefore immediately accessible to him and subject to his exclusive or joint dominion and control. [Citation.]" (*Id.* at p. 53; see also *People v. Webb* (1967) 66 Cal.2d 107, 127 [sufficient evidence to prove defendant possessed narcotics where he was driving his own vehicle, was the sole occupant, a red balloon containing narcotics was found on the driver's side floor between where his feet would normally rest, and he violently attempted to evade arrest]; *People v. Nieto* (1966) 247 Cal.App.2d 364, 368 [evidence of illegal firearm possession sufficient where defendant was driving his own vehicle with a passenger in the car, and guns were found partially protruding from under the front seat; "[a]t the very least, this is circumstantial evidence supportive of a finding of joint or constructive possession"].)

As is readily apparent, the facts in the instant case are not on all fours with any of the cited cases. Flores contends the evidence was insufficient to prove he exercised dominion and control over the drugs, or knew of their presence. He correctly points out that the drugs were tucked into the ceiling upholstery and could not be seen without moving the upholstery. The officer testified he had no "idea of what was in there" until he pulled the upholstery down and saw the drugs. None of Flores's personal effects were found with the drugs, or in the car. When stopped, Flores did not reach toward the ceiling lining, make any furtive or suspicious movements, or do anything indicating consciousness of guilt. Further, because it was undisputed that the SUV did not belong to him, Flores urges that any inference of dominion and control was undercut. " 'The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence [citation], his automobile [citation], or his personal effects [citation]. However, when the contraband is located at premises other than those of the defendant, dominion and control

may not be inferred solely from the fact of defendant's presence, even where the evidence shows knowledge of the presence of the drug and of its narcotic character.' [Citation.]" (*People v. Johnson, supra,* 158 Cal.App.3d at p. 854.) Flores also correctly points out that there was no evidence establishing how long he had been in possession of the SUV or how frequently he drove it.

The People, on the other hand, urge that it was readily apparent the upholstery was partially detached from the ceiling on the driver's side where Flores was seated, although the drugs themselves were not immediately visible. There were 43 empty, "very small" individual baggies inside a larger baggie in plain view in the center console. Meneses testified that baggies are used to package drugs and "to have 43 of them" was "very unusual." Flores was the only person in the car, and clearly had possession and control of it. The narcotics were within his easy reach, above his head. The area was known for narcotics sales.[7] Significantly, Flores was carrying $140 in his sock, consisting of six $20 bills and two $10 bills. Meneses testified that drug dealers usually sell "in denominations of tens [and] twenties." In his experience, it was uncommon for a person in the neighborhood where Flores was stopped to have that amount of money on his or her person unless they were involved in drug sales. (But see *People v. Glass, supra,* 44 Cal.App.3d at p. 777 ["The presence of $270 in appellant's wallet would have some probative effect as circumstantial evidence if it was shown appellant was unemployed [citation]. However, no such showing was made in this case"].) Certainly, the jury could conclude it was unusual to stash so much cash in one's sock, leading to the inference that Flores was hiding the proceeds of drug sales.

While we, like the trial court, consider the question close, on balance, we conclude the evidence was sufficient. At the time the narcotics were discovered, Flores, the driver and only passenger in the SUV, had exclusive dominion and control over the vehicle and anything contained therein. As noted, an inference of dominion and control is easily

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[7] As Flores points out, however, the significance of this evidence is diminished by the fact that he lived in the neighborhood.

made when the contraband is found in a place over which the defendant has general dominion and control, such as his automobile. (*People v. Johnson, supra,* 158 Cal.App.3d at p. 854.) Although the SUV did not belong to Flores, he was the sole driver and occupant. This fact distinguishes this case from cases such as *People v. Johnson, supra,* 158 Cal.App.3d 850, and *People v. Savage, supra,* 128 Cal.App.2d 123, where several other persons were in the location and could have left the drugs behind. At the time the section 1118.1 motion was made, there was no evidence that other people had recently driven the SUV.

Moreover, although the drugs themselves were not visible, the torn upholstery was noticeable, as shown by the fact Meneses observed it immediately upon entering the vehicle. Unlike in *People v. Johnson, supra,* 158 Cal.App.3d 850, where access to the PCP in the ceiling required the use of a stepstool, here the baggies were within Flores's easy reach. The drugs were " 'immediately and exclusively accessible to' " Flores. (*Id*. at p. 854.) The baggies in plain view in the center console were of a number and size highly suggestive of drug sales. While none of these facts, standing alone, would have been sufficient to establish the offense, considered together and in the context of the evidence as a whole, we believe they were sufficient.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.